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March 13, 2002

VIA HAND DELIVERY

Ms. Marlene ti. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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MAR 13 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte* Notification
MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244
2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules

Dear Ms. Dortch:

On March 12, 2003, Alexander Netchvolodoff, Senior Vice President of Public Policy, and Alexandra Wilson, Vice President of Public Policy for Cox Enterprises, Inc. ("Cox"), and the undersigned, counsel for Cox and its subsidiaries, met with Ms. Stacy Robinson, legal advisor Commissioner Kathleen Abemathy. At this meeting, we discussed and submitted the attached summary of the arguments set forth in Cox's Comments and Reply Comments in the above-referenced proceeding.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosure are being submitted to the Secretary's office for the above-captioned docket, and a copy is being provided to Ms. Robinson. Pursuant to the Commission's *Notice of Proposed Rulemaking* in this proceeding, copies also are being provided to Ms. Mania Baghdad], Ms. Linda Senecal, and Qualex International. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

To-Quyen Truong

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TTT/
Enclosure
cc: Stacy Robinson, Esq.
Mania Baghdadi, Esq.
Linda Senecal
Qualex International (2 copies)

Cox Enterprises, Lnc.
Written ***Ex Parte* in MM** Docket **Nos. 02-277, 01-235, 01-317** and **00-244**

What the **D.C.** Circuit ***Has*** Said:

- The national broadcast cap and the local broadcast ownership rules "are not closely related analytically," and each type of rule raises different public policy considerations. Accordingly, retention of the 35% national cap is not inconsistent with relaxation of the local ownership rules. *Fox,* 280 F.3d at 1044.
- The Commission must maintain analytical consistency in analogous proceedings and provide a reasoned basis for any apparent inconsistencies. *Fox*, 280 F.3d at 1044-45; *Sinclair*, 284 F.3d at 162-65. Pursuant to this consistency requirement:
  - The Commission must provide a reasoned explanation for its departure from the *1984 Report* finding that the rule could safely be eliminated.
  - The Commission's analysis of the impact of the national cap on diversity must be consistent with the court's decision in *Time Warner II* and the Commission's own *Program* ***Access Order.***
  - The Commission cannot retain the newspaper-broadcast cross-ownership prohibition while other local restrictions (e.g., broadcast duopolies and cable-broadcast cross-ownership) are relaxed or eliminated.

What the **D.C.** Circuit ***Has Not*** Said:

- The court has not limited the Commission to only statistical evidence or the results of empirical studies when conducting its media ownership analysis. Indeed, the **APA** requires the Commission to consider all the record evidence (including real-life examples, not just studies and statistics) and apply its expertise and predictive reasoning. particularly when addressing public policy goals embraced by Congress that are "elusive" or "not easily defined." *Sinclair*, 284 F.3d at 159-60.
- The court has already rejected the nctworks' argument that the existence of the antitrust laws, and increases in competition and diversity of media outlets since adoption of the national cap, mandate relaxation or repeal of the cap. ***Fox,*** 280 F.3d at 1045-47; **see** *also Turner II*, 520 U.S. at 194; *Progrum* ***Access*** *Order,* 17 FCC Rcd at 12143 11.138. Instead, the court has tasked the Commission with evaluating whether the record evidence demonstrates that the cap should be retained to preserve competition, diversity and/or localism, the three policy pillars codified by Congress in the Communications Act. *Fox,* 280 F.3d at 1052-53.

Issues and Evidence ***Ignored*** **by** the Networks:

- The networks generally have ignored the record evidence demonstrating that:
  - In the wake of earlier broadcast deregulation, including Congress's decision in I996 to raise the national cap from 25% to 35%, the networks have extended their web of media ownership interests, dramatically increasing the networks'

incentive and ability to distribute their nationalized programming across a variety of media platfomis.

- o The networks' overriding incentive to pursue their national distribution agenda has adversely affected *local broadcast audiences*, because O&Os, and increasingly affiliates, are forced to promote the networks' national agenda rather than focusing on local viewer needs and tastes.
- o The networks' pursuit of their national distribution agenda also has adversely affected *local cable consumers*, because the networks have used retransmission consent negotiations to leverage their large and powerful footprint of O&Os to secure carriage of network-affiliated cable networks in compensation deals that reduce local consumer choice and increase cable rates.
- o Increasing the national cap would exponentially increase the networks' ability to pursue their national distribution agenda to the detriment of local broadcast and cable audiences, and undermine the local broadcast licensing scheme established by Congress as an essential part of our national discourse and federal system of government.

- The networks' sole "rebuttals" to these arguments arc:

  - o *Consumers can always turn to other media outlets* – an argument that the Fox court already has explicitly rejected *(Fox,* 280 F.3d at 1045-47);
  - o *Cox also owns multiple media interests* – a fact which is irrelevant to this proceeding since Cox, as an operator of local media outlets, is structurally different and, unlike the networks, does not have a national program distribution agenda; and
  - o *One of the four major networks (Disney/ABC) has adopted a practice of offering a cash alternative during retransmission consent negotiations* – a practice that Disney/ABC indisputably did not employ in its retransmission consent negotiations with Cox, that was not employed by the other networks in their dealings with Cox, and that is beside the point in any event.

- The networks also completely ignore the extensive evidence submitted by NASA/NAB and Cox demonstrating that (1) independent affiliates, not O&Os, play a critical role in influencing network programming decisions by representing community viewpoints; (2) affiliates, not O&Os, resist network practices (such as cross-promotions and repurposing) that promote the networks' national distribution agenda at the expense of local audiences; and (3) affiliates, not O&Os, serve as laboratories for experimentation and innovation.

Issues That the Networks Attempt *to Obscure:*

- On the few substantive points on which they have engaged, the networks have attempted to *obscure* the real issue before the Commission:

- The networks embrace an overly narrow concept of "localism" (equating localism with locally produced content or local news) that is unsupported by precedent and directly contradicts the networks' broad concept of "diversity" that they simultaneously urge upon the Commission.
- Focusing narrowly (and irrelevantly) on local news programming, the networks assert that O&Os air "significantly more" of such programming (30%) than affiliates, when in fact there is no difference between O&Os and affiliates when Fox news programming is appropriately subtracted from the equation. Similarly, although localism is, again, not defined by the quality of local news, independent researchers such as the Project for Excellence in Journalism have found that affiliates produce higher quality newscasts than O&Os, and that affiliates operating cross-owned newspapers produce the highest quality newscasts.
- The networks also attempt to equate "localism" with local ownership, when in fact the geographic location of the station owner is irrelevant. The critical question is whether the station bases its programming decisions on local audience interests, or whether the station is largely driven by the national program distribution agenda of its corporate parent, even at the expense of local audience interests.
- On the issue of preemptions, the networks have deliberately ignored the FCC's stated expectation that they submit into the record systematic data concerning preemption patterns over time. Instead, the networks have introduced only selective prime-time preemption data from a single year (2001) that the Commission must assume presents the best case possible for the networks. Yet even using the networks' own flawed databases, affiliates preempt network prime-time programming between 40% to 279% more often than O&Os a difference that the networks inexplicably describe as being "ever so slight". (Query how the networks can describe the alleged 30% difference in the amount of local news carried by O&Os vs. affiliates as "significant," but the 40 to 279% difference in preemption patterns as "ever so slight.") Moreover, the far more reliable preemption data submitted by NASA/NAB reveals (1) that the average number of total hours preempted by affiliates is 3 to 3.5 times greater than the number of prime-time preemptions reported by the networks, and *(2)* that affiliate preemptions have been driven down over time under unrelenting network pressure.

<u>Conclusion</u>: The D.C. Circuit already has rejected the very arguments repeated by the networks on remand for relaxation or repeal of the national broadcast cap. And, the networks have not rebutted the overwhelming factual evidence submitted in this proceeding that the cap is necessary to protect competition, diversity and, most importantly, localism, a bedrock principle of the statutory licensing scheme for broadcasting codified by Congress in the Communications Act.